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Supreme Court, U.S.
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No. 98-1063

In the

Supreme Court of the United States

October Term, 1998

JOHN D. SHADE,

Petitioner,

-v-

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

When a maritime employee receives discrete job assignments through his or her union pursuant to a collective bargaining agreement, can that employee aggregate multiple discrete prior employments with the same and other employers for the purpose of establishing the substantiality prong of the seaman status test under *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) and, as to prior discrete employments with the same employer, is it even necessary to consider the continuity of these prior discrete employments.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF CORPORATE RESPONDENT

The parent company of Respondent, Great Lakes Dredge & Dock Company is Great Lakes Dredge & Dock Corporation, a Delaware corporation.

Nonwholly owned subsidiaries of Great Lakes Dredge & Dock Company are North American Trailing Company, NATCO Limited Partnership and Amboy Aggregates Joint Venture.

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The judgment of the Third Circuit Court of Appeals was omitted from petitioner's Appendix. That judgment is reproduced in the Appendix hereto at 1a. The Opinion of the Third Circuit is now reported: *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143 (3d Cir. 1998).

STATEMENT OF THE CASE

On December 9, 1994, John D. Shade ("Shade") began employment with Great Lakes Dredge & Dock Company ("Great Lakes") on a beach replenishment job in Cape May, New Jersey. Shade was a member of Local 25, Marine Division, International Union of Operating Engineers, AFL-CIO ("Local 25") and received his job assignments from Local 25. Immediately before his assignment by Local 25 to Great Lakes at the Cape May job, Shade had been assigned by Local 25 to a job with another employer, Bean-Weeks Joint Venture ("Bean-Weeks"). Shade was employed by Bean-Weeks continuously from March through November 5, 1994 on a discrete job. Prior to his employment with Bean-Weeks, Shade had been assigned by Local 25 to multiple discrete assignments with Great Lakes during the period September, 1992 to early February, 1994.

On the Cape May job, Shade had an employment-related connection to only one Great Lakes' vessel, Anchor Barge 110. Although there were other Great Lakes' vessels on the Cape May job, Shade admitted he had no employment-related connection to any of them. Shade contended that his duties on the Cape May job qualified him for seaman status. Since his only employment-related connection to a vessel on that job was with Anchor Barge 110, Shade claimed seaman status as a member of the crew of Anchor Barge 110. At trial, Shade introduced evidence that 90% of his work activities on the Cape May job involved performing ship's work aboard Anchor Barge 110. Great Lakes refuted this contention and offered evidence that Shade's performance of ship's work aboard Anchor Barge

110 was limited to a two day period at the beginning of his employment on the job.

Anticipating that Shade might improperly attempt to invoke the "fleet seaman doctrine" by introducing evidence of his prior vessel-related employments with Great Lakes and other employers, Great Lakes filed a pre-trial motion in limine to preclude Shade from offering and the district court admitting into evidence Shade's employments prior to December 9, 1994 with Great Lakes and others. The district court deferred ruling on Great Lakes' motion in limine. During his opening statement at trial, over the objection of Great Lakes, Shade was permitted to invoke the entirety of his maritime career working as a deckhand aboard vessels for multiple employers including Great Lakes. During examination and cross-examination of witnesses, over the objection of Great Lakes, Shade was permitted to elicit his prior employments with Great Lakes and others including the nature of these prior employments as ship's work aboard vessels. Finally, over the objection of Great Lakes, Shade was permitted to introduce into evidence a document prepared by Local 25 indicating Shade's employment history with Great Lakes and others from September, 1992 through March, 1994 including the designation "deckhand" for these discrete employments. Using the evidence of his prior employments with Great Lakes and others, Shade was permitted to argue to the jury that the determination of his seaman status was not limited to his activities on the Cape May job. Rather, the jury was to consider his entire maritime career much of which involved traditional seaman's work. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 154 (3d Cir. 1998).

Contrary to his assertions on page 3 of the Petition for a Writ of Certiorari, Shade's prior employment with Bean-Weeks did not end on December 8, 1994 and he did not report to the Cape May job as a deckhand. Rather, his prior employment with Bean-Weeks ended on November 5, 1994 and he was hired by Great Lakes on the Cape May job to perform the duties of a shoreman in accordance with a requirement of the collective bargaining agreement. Similarly, Shade's assertion at page 4 of his Petition that his duties on the beach on December 30, 1994 related to the submersible pipeline is neither supported by the evidence nor logic. The submersible pipeline rested on the ocean's floor. At the point where the submersible pipeline came out of the water at the edge of the beach, it ended and the shore pipeline began. Shade's duties on the day of his injury and for the five preceding days related to the shore pipeline, not the submersible pipeline. Finally, Shade's self-serving assertion at page 4 of his Petition that, "Had he not been injured, he would have continued his employment on navigable waters," is not supported by the evidence. There was no evidence at the trial as to what work activities Shade would have been assigned had he not been injured.

In Shade's Petition, a substantial portion of the Statement of the Case is devoted to excerpts from the district court's charge (pp. 4-6). Shade ignores that the Third Circuit

did not order a new trial based on the impropriety of the district court's charge.[1] Rather, the Third Circuit ordered a new trial based on the district court's improperly admitting evidence of Shade's prior employments with Great Lakes and other employers. As to other employers, in footnote 1 of his Petition, Shade argues that the admission of his prior employments with other employers was harmless error because the district court charged that such prior employments were not proper to consider in determining Shade's seaman status on the Cape May job. That argument was properly rejected by the Third Circuit because the district court permitted Shade to argue to the jury the entirety of his maritime career, including significant employments with others, as the keystone of his seaman status contention. Further, Shade makes no effort to reconcile the contradiction in the district court permitting him to introduce evidence of his prior employments with others and arguing those prior employments to the jury while at the same time charging the jury it was improper to consider those prior employments with others.

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[1] In addition to the evidentiary issue involving prior employments, Great Lakes' appeal to the Third Circuit included challenges to the district court's charge. Because of its ruling on the prior employments' evidentiary issue, the Third Circuit did not address any of Great Lakes' objections to the charge. 154 F.3d at 148 n.2.

ARGUMENT

I. BARRING CONSIDERATION OF DISCRETE PRIOR EMPLOYMENTS WITH THE SAME AND OTHER EMPLOYERS COMPORTS WITH *CHANDRIS, INC. V. LATSIS*, 515 U.S. 347 (1995) AND *HARBOR TUG & BARGE CO. V. PAPAI*, 520 U.S. 548, 117 S.CT. 1535 (1997) AS WELL AS THE DECISIONS OF ALL CIRCUIT COURTS OF APPEALS THAT HAVE CONSIDERED THE ISSUE; THE THIRD CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT COURT OF APPEALS

As the Third Circuit observed, the district court permitted Shade to introduce evidence of two types of prior employments: (a) with other employers and (b) with Great Lakes. 154 F.3d at 151. Shade was permitted to testify about his work activities as a deckhand aboard vessels during the entirety of his maritime career from 1974 until the time of his injury. Included among this evidence was Shade's employment as a deckhand with Bean-Weeks from March through November 5, 1994. At page 3 of his Petition, Shade concedes that most of his employments during his maritime career were with another employer ("During most of his maritime career, Shade worked for American Dredging Company"). In *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1998), 117 S.Ct. 1535, this Court held that it is improper for the factfinder to consider prior employments with other employers in determining the substantiality prong of the seaman status test. Accordingly, the Third Circuit was correct in ordering a new

trial on the basis of the district court's improperly admitting into evidence Shade's prior employments with other employers. For this reason alone, Shade's Petition should be denied.

As for Shade's prior discrete employments with Great Lakes, it is sufficient to note that the same arguments advanced by Shade here and in the Third Circuit were advanced by the maritime employee in *Harbor Tug* and rejected. As concerns the evidence to be considered by the factfinder in determining the substantiality prong of the seaman status test, *Chandris* instructs:

> [W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a workers service with a particular employer . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

515 U.S. at 371-72.

In *Harbor Tug*, this Court explained the meaning of the above-quoted language from *Chandris* as follows:

> [T]he context of our statement in *Chandris* makes clear our meaning, which is that the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different `essential duties' than his previous ones. . . . In *Chandris*, the words `particular employer' give emphasis to the point that the inquiry into the nature of the employee's duties for seaman-status purposes may concentrate on a *narrower*, not *broader*, period than the employee's entire course of employment with his current employer.

117 S.Ct. at 1541 (citation omitted) (emphasis added). In holding that the maritime employee under consideration there could not accumulate his prior continuous employments with the same employer to establish a substantial connection to a vessel in navigation, *Harbor Tug* observed:

> [T]hese discrete engagements were separate from the one in question, which was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that, as we explained in *Chandris*, does not qualify one for seaman status.

117 S.Ct. at 1542 (citation omitted).

There is no question that Shade's prior employments with Great Lakes from September, 1992 to February, 1994 were separate from his employment at Cape May. A ten month interval existed between Shade's last discrete assignment with Great Lakes and his employment on the Cape May job. Similarly, it is beyond question that Shade's essential duties on the Cape May job were different than his duties on the prior discrete jobs with Great Lakes. In his improperly admitted trial testimony, Shade testified that he performed the duties of a deckhand aboard vessels in navigable waters during these prior employments. At the Cape May job, by his own admission, Shade performed the work of a shoreman on the beach for part of the time he was employed there. Accordingly, the Third Circuit properly applied *Chandris* and *Harbor Tug* in holding that evidence of Shade's prior discrete employments with Great Lakes should not have been submitted to the jury.

Because of the holdings in *Chandris* and *Harbor Tug* that prior discrete employments with the same employer, continuous or otherwise, are not to be considered in assessing a maritime employee's substantial connection to a vessel in

navigation, it was unnecessary for the Third Circuit to consider the continuous versus non-continuous prior employment dichotomy. To the extent the Third Circuit considered it, it is significant to note that its holding is consonant with the holdings of the Fifth and Ninth Circuits, the only other courts of appeals that have considered the issue. *See Patton-Tully Transportation Co. v. Ratliff*, 797 F.2d 206, 210 (5th Cir. 1986); *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 525 (9th Cir. 1989). Additionally, the absence of continuity in the employments serves to emphasize the discrete nature of the employments.

The Third Circuit's holding that Shade's prior discrete employments with Great Lakes were improperly admitted into evidence is consistent with the prior decisions of this Court and the other circuit courts of appeals that have considered the issue. Accordingly, since the question presented in Shade's Petition already has been decided by this Court and there is no conflict among the courts of appeals, there is no important reason to issue a Writ of Certiorari.

CONCLUSION

For all of the reasons set forth herein, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-2023

JOHN D. SHADE

v.

GREAT LAKES DREDGE & DOCK COMPANY,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C Civ. No. 97-00739)

Present: Greenberg, Scirica and McKee, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on July 30, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court entered November 19, 1997, be, and the same is hereby reversed and the cause is remanded to the District Court for a new trial in a matter [sic] consistent with this opinion. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

S/ P. Douglas Sisk
Clerk

Dated: 3 September 1998